APPENDIX

Section 7152. Time for taking appeals. An appeal may be taken to the supreme court from a district court:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; *from any special order made after final judgment;* and from an interlocutory judgment in action for partition of real property; *within* 60 *days* after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk. (Italics ours.)

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MAR 21 1932

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 21

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit,
and
Brief in Support Thereof

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. .....

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,
Respondent.

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Vivian F. Baldwin and E. R. Baldwin respectfully shows to this Honorable Court:

OPINIONS OF THE COURTS BELOW

The decision of the United States Circuit Court of Appeals for the Ninth Circuit, which petitioners seek to have this Honorable Court review, was filed January 18, 1932, petition for rehearing being denied February 23, 1932. (R., 267) The opinion is not yet reported, but will be found commencing at page 250 of the record.

Other decisions rendered in the course of the litigation involved herein are:

American Surety Co. v. Baldwin, 51 Fed. (2d) 596. (R., 183);

Baldwin v. American Surety Co., 50 Idaho 606. (R., 47);

Baldwin v. Singer Sewing Machine Co., et al., 49 Idaho 231.

ORDER OF THE SUPREME COURT OF THE UNITED STATES

In addition to the foregoing, we respectfully call attention to the following case pending in this Honorable Court:

American Surety Co. v. Baldwin, October Term, 1931, No. 494, United States Supreme Court,

and to the order entered therein January 11, 1932. (Not officially reported.)

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioners commenced an action for damages in the District Court of Ada County, State of Idaho, against the Singer Sewing Machine Company and Ed Anderson, which resulted in the entry of judgment, May 31, 1928, in favor of petitioners and against defendants Singer Sewing Machine Company and Ed Anderson, jointly, with no several liability adjudged against either of them. (R. 33) Thereafter, on August 27, 1928, the said two defendants gave a *joint* (not joint and several) notice of appeal to the Supreme Court of Idaho, which notice recited that the appeal was from the judgment "* * * and from the whole thereof." (R. 35)

Two days later, the American Surety Company (respondent herein) appeared in the action and filed its supersedeas undertaking, pursuant to Section 7155, Idaho Compiled Statutes, (Appendix A) conditioned that whereas the joint appeal was from the *whole* of the judgment, execution should be stayed as to the judgment *so appealed from* and that "* * * if the said judgment appealed from, or any part thereof, be affirmed * * *" the said judgment would be paid; and if not paid within thirty days after the filing of the remittitur of the Supreme Court of Idaho "* * * judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum * * *." (R. 19)

This undertaking was not the ordinary contract of principal and surety and was not signed by any one as principal (R. 21) but was, as construed by the Supreme Court of Idaho, "* * * a complete, independent contract. The obligation of its maker (the surety company) is not collateral or secondary." (R. 52) Upon appeal to the Supreme Court of Idaho, the

judgment was affirmed as to the defendant Anderson and reversed as to the Singer Sewing Machine Company, (Baldwin v. Singer Sewing Machine Company, et al., 49 Idaho 231) remittitur being filed in the trial court May 22, 1930. (R. 26)

June 23, 1930, (more than thirty days having elapsed since the filing of the remittitur and the judgment being unpaid) petitioners appeared and moved the trial court to enter judgment in their favor and against the American Surety Company, which motion was granted and judgment was entered in favor of petitioners and against the American Surety Company in the sum of $22,357.20, together with interest thereon, and a provision "* * * that the plaintiffs have execution therefor." (R. 24) Execution was immediately issued and levied by the sheriff of Ada County the following day.

Three days later, the American Surety Company, through its counsel, appearing generally, (R. 35, 36, 39) moved to vacate and set aside the judgment upon the grounds that it was void, that its enforcement was contrary to good conscience and equity, and that the judgment was entered without notice to the American Surety Company or the Singer Sewing Machine Company. (R., 36) In the same instrument the surety company moved the court to stay all proceedings under execution upon said judgment. (R., 38) The motion was made and based upon all the records and files in the action and a copy of the supersedeas undertaking attached to the motion. (R., 38-39) August 12, 1930, the trial court entered an order declaring the said judgment of June 23, 1930, void, and quashing the execution proceedings thereunder, from which petitioners appealed to the Supreme Court of Idaho. (R., 42)

Upon that appeal to the Supreme Court of Idaho, the surety company stipulated as to the papers to be included in the transcript on appeal, and stipulated to the correctness of the transcript. (R., 43-46) In the Supreme Court of Idaho, the American Surety Company, appearing generally, submitted the cause orally and upon briefs. (Baldwin vs. Anderson, 50 Idaho 606, 613.) Thereafter the Supreme Court of Idaho, Justice McNaughton delivering the opinion, rendered its judgment, reversing the trial court, declaring the supersedeas undertaking was the complete, independent contract of the surety, and not collateral or secondary, and declaring that the judgment of June 23, 1930, was not void. (R. 47)

The surety company's petition for rehearing was denied and the remittitur of the Supreme Court filed in the trial court June 3, 1931. (R. 65)

On June 17, 1931, respondents again caused to be issued a general execution against the American Surety Company (R. 94) pursuant to which United States bonds in the sum of $25,000.00 deposited by the surety company with the treasurer of the State of Idaho, as provided by law, were levied upon and sale of the same to satisfy execution was set for August 5, 1931. (R. 92) The long period elapsing between the date of the execution and date of sale was due to Section 5104, Idaho Compiled Statutes, (R. 96) which requires that securities deposited with the State Treasurer by a foreign surety company cannot be sold until 40 days notice is given to the surety at its home address.

Upon the day following the issuance of the execution, the surety company filed in the State District Court a motion *to amend and correct the judgment* of June 23, 1930, and to vacate said judgment as amended. (R. 69) In this proceeding the surety company again appeared generally (R. 69, 72) and supported its motion by a lengthy showing of fact, going into the whole proceeding which led to the entry of judgment against it. (R. 72-91)

The bill of complaint herein was not filed in the United States District Court for the District of Idaho until July 6, 1931. (R. 1) It prayed for an injunction against petitioners *and the sheriff of Ada County, Idaho,* restraining them from levying or attempting to levy upon any property of the American Surety Company or otherwise attempting to collect the judgment of June 23, 1930, (R. 16) and allegations were made that the decision of the Supreme Court of Idaho, dated May 2, 1931, was erroneous (R. 19) that the said judgment of June 23, 1930, was void for want of jurisdiction, and that according to the conclusions of the pleader, petitioners had committed fraud in merely presenting their motion for judgment. (R. 6). July 13, 1931, the motion to amend and vacate the judgment was overruled and denied by the state trial judge (R. 132-133) and on the same day a notice of appeal to the Supreme Court of Idaho from the said judgment of June 23, 1930, was served and filed by the surety company. (R. 122) Two days later the surety company served and filed its notice of appeal to the Supreme Court of Idaho from the

order denying its motion to amend and vacate the judgment. (R. 126) In all of these proceedings, the surety company appeared generally. No supersedeas or undertaking to stay execution of the judgment on appeal to the Supreme Court of Idaho was filed, although the Idaho statutes permitted the company to do so as a matter of right; Section 7155, Idaho Compiled Statutes. (Appendix A)

The surety company's motion for temporary injunction was heard July 28, 1931 (R. 192) in the United States District Court, after the surety company's appeal from the state court judgment had been taken and after its motion in state court to amend that judgment had been denied and it had taken a second appeal from that denial to the Supreme Court of Idaho. (R. 122, 126) The hearing was had upon the bill of complaint, (R. 1) petitioners' (defendants therein) showing in opposition thereto, (R. 29) and the surety company's rebuttal showing, as well as upon petitioners' motion to strike from the bill (R. 146) and motion to dismiss. (R. 144) On July 31, 1931, Federal Judge Cavanah handed down his memorandum opinion (American Surety Company v. Baldwin, 51 Fed. (2d) 596) (R. 183) and in conformity therewith, on August 1, 1931, entered an order denying the surety company's motion for a temporary injunction and sustaining and granting defendants motion to strike and granting defendants motion to dismiss the bill of complaint. (R. 192) The same day, upon the refusal of the surety company to plead further, a final decree was entered, dismissing the bill with prejudice, (R. 194) from which appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 206)

August 14th, 1931, on application of the surety company (R. 223), and over the objections of your petitioners, (R. 232) the Circuit Court of Appeals entered a temporary restraining order pending appeal. (R. 236)

At this point we beg leave to digress from the record of this particular proceeding and refer to the case of *American Surety Company, petitioner, vs. Vivian F. Baldwin and E. R. Baldwin, No.* 494, *October Term*, 1931, now pending in this Honorable Court and referred to in the decision of the Circuit Court of Appeals. (R. 253) That proceeding is based upon a petition of the American Surety Company for writ of certiorari to review the decision of the Supreme Court of Idaho

dated May 2, 1931, the identical decision in question in the case at bar. (R. 47)* For convenience we shall refer to that proceeding instituted by the American Surety Company as Case No. 494. In that case, on October 30, 1931, the surety company filed a transcript of the record in the Idaho Supreme Court together with its petition for writ of certiorari, in this Honorable Court, in response to which these petitioners (respondents therein) filed their motion to dismiss the petition for certiorari upon the grounds (1) that the two appeals taken by the surety company to the Supreme Court of Idaho (R. 122, 126) were pending and undisposed of in the Idaho court and (2) that no Federal question was properly raised. Respondents also filed brief in opposition to petition for writ of certiorari (all in the records of Case No. 494).

While those matters in Case No. 494 were pending in this Honorable Court, the case at bar was called for argument in the United States Circuit Court of Appeals for the Ninth Circuit on December 14, 1931, at which time the court was advised that the surety company's petition for writ of certiorari to the Supreme Court of Idaho was pending in the Supreme Court of the United States in Case No. 494. (R., 253) On the 11th day of January, 1932, this Honorable Court entered its order** in Case No. 494, which cause is still pending.

We have gone into this proceeding in some detail for the reason that the question of due process passed upon by the Circuit Court of Appeals is the identical question presented to this court upon the surety company's petition for writ of certiorari to the Supreme Court of Idaho.

January 18, 1932, the Circuit Court of Appeals filed its opinion and judgment reversing the trial court's final decree of dismissal, and directing that a temporary injunction be issued by the trial court. (R., 250, 266) The order of the trial court, sustaining the motion to strike from the complaint was not, however, disturbed.

In reversing the lower court, the Circuit Court of Appeals in effect expressly reversed the decision of the Supreme Court of Idaho of May 2, 1931, in the following language:

*The identical decision appears at pages 46 to 55 of the record filed in this court in Case No. 494, October Term, 1931.

**"IT IS ORDERED by the Court that action upon the petition for writ of certiorari in the above entitled cause be, and the same is hereby, withheld awaiting the action of the Supreme Court of Idaho in the matters pending before it."

"This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void." (R., 260)

The Circuit Court of Appeals further held that the Singer Sewing Machine Company was the principal in the supersedeas under consideration (R., 260), in conflict with the construction placed upon Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho, which held that the contract of the surety was a separate, independent obligation of the surety company through which it made its voluntary appearance in the State District Court and thereby became a party to all proceedings thereafter. (R., 52) The Circuit Court of Appeals further held that the giving of judgment was "in violation of the Federal Constitution" (R. 260), and declined to give full faith and credit to the judgment of the Supreme Court of Idaho, (R. 256) or consider the decision of the Supreme Court of Idaho *res judicata.*

Petition for rehearing was filed in the Circuit Court of Appeals which was denied February 23, 1932 (R., 266), and upon application (R. 267) a stay of mandate was ordered. R. 268) Therefore this petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review said decision is presented.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of the Circuit Courts of Appeals for the Second, Sixth and Eighth Circuits on a controlling and decisive question of law involved in this case.

Thomas v. Virden, 160 Fed. 418, (2d C. C. A.);

Phelps v. Mutual Reserve Fund Life Assoc., 112 Fed. 453 (6th C. A. A.);

Ostrander-Seymour Co. v. Grand Rapids Trust Co., 50 Fed. (2d) 567 (6th C. C. A.);

Serpell-Weinner-Jordan v. Crete Mills, 51 Fed (2d) 1028. (8th C. C. A.);

(b) The Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law in a way in conflict with the local applicable decisions, in that the Circuit Court of Appeals has held that the Singer Sewing Machine Company was principal and the American Surety Company surety in the supersedeas undertaking filed in the State Court, (R., 19) whereas the Supreme Court of Idaho has held that the bond given, under Section 7155, Idaho Compiled Statutes, is the separate, independent contract of the surety company, and that its liability thereunder is neither collateral nor secondary.

Baldwin v. American Surety Co., 50 Idaho 606.

Such decision of the Circuit Court of Appeals is in conflict with the weight of authority and with local decisions of states other than Idaho, having statutes similar to Idaho's Section 7155, C. S., which decisions were followed and approved by the Supreme Court of Idaho.

Curtis v. Richards, et al., 9 Cal. 33, 38;*

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Moffat v. Greenawalt, 90 Cal. 368;

Hawley v. Gray Bros. etc. Co., 127 Cal. 560;

Gray v. Cotton, 174 Cal. 256;**

Portland Trust Co., v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Shannon v. Dodge, 18 Colo. 164;

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369. (9th C. C. A., construing Sec. 7155, I. C. S.);

And See: Pease vs. Rathbun-Jones Eng. Co., 243 U. S. 273.

(c) The Circuit Court of Appeals for the Ninth Circuit has declined to accept the construction placed upon Section 7155,

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*This decision was written by Mr. Justice Field during his term as an associate justice of the Supreme Court of California.

**The several California decisions are cited for the reason that Idaho adopted the statute in question from California.

Idaho Compiled Statutes, by the highest court of the State of Idaho, and has thereby declined to follow the rule of this court announced in *Supreme Lodge, Knights of Pythias v. Meyer,* 265 *U. S.* 30.

(d) The Circuit Court of Appeals has decided an important question of general law in conflict with the weight of authority and, in doing so, has decided an important question of Federal law in conflict with the applicable decisions of this court. Namely, that a lower Federal court cannot review the decision of a State court of last resort for error, and reverse the same.

> Nickel v. Cole, 256 U. S. 222;
>
> Enterprise Irr. Co. v. Farmers, etc. Canal Co., 243 U. S. 157;
>
> Fauntleroy v. Lum, 210 U. S. 230;
>
> Arrowsmith v. Harmoning, 118 U. S. 194.
>
> Grignon v. Astor, 2 How. 319;

(e) The Circuit Court of Appeals further refused to follow and, in effect, reversed the Idaho Supreme Court, in this, that whereas the State court held that, under Section 7155, Idaho Compiled Statutes, when the surety company first appeared in the original action and filed its undertaking it thereby became and remained a party to the action, and was thereafter in court; (R., 51-52) the Circuit Court of Appeals held (R. 260) that such appearance did not make the surety company a party to the action in State court, and further stated that the Circuit Court of Appeals

> "would concur in this opinion" (of the State court) "if the premise were granted that the surety was in court at the time the trial court entered the judgment against it." (R., 260)

(f) The Circuit Court of Appeals for the Ninth Circuit has decided a Federal question, namely, that the judgment of the Idaho court of June 23, 1930, and the decision of the Supreme Court of Idaho, dated May 2, 1931, were "in violation of the Federal Constitution" (R., 260), and has refused to give full faith and credit to the State court judgment, in violation of Section 1, Article IV of the Constitution of the

United States, in conflict with the decision of this court in *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 *U. S.* 522, *which decision we believe to be controlling in the case at bar.*

(g) The Circuit Court of Appeals has reversed the Supreme Court of Idaho and in so doing has declined to follow the rule of this court that

"Lower Federal courts are not superior to State courts."

Lion Bonding & S. Co. v. Karatz, 262 U. S. 77.

(h) By decision of the Circuit Court of Appeals, the American Surety Company has been allowed to litigate twice the question of jurisdiction, contrary to the most recent expression of this court upon the subject; *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 *U. S.* 522.

The Circuit Court of Appeals has declined to follow the rules announced by the Supreme Court of Idaho in

Elliott & Healy v. Wirth, 34 Idaho 805,

and

Baldwin v. American Surety Co., 50 Idaho 606,

under which decisions not only the surety company's original appearance, but its motion to vacate the judgment and quash the execution, and its later proceedings in the State court, all of which later proceedings were based upon non-jurisdictional as well as jurisdictional grounds, constituted a general appearance and a waiver of lack of due process, if any such lack theretofore existed.

See: Western L. Indemnity Co. v. Rupp, 235 U. S. 261.

PRAYER

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, No. 6566, American Surety Company of New York, appellant, v. Vivian F. Baldwin and E. R. Baldwin, appellees, and that the decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honor-

able Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

VIVIAN F. BALDWIN and E. R. BALDWIN,

By JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Petitioners.

Brief in support of Petition appears on page 12.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.....

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,
Respondent.

Brief in Support of Petition

I.

OPINIONS OF THE COURTS BELOW

The opinions of the courts below are cited on page 1 of the petition herein.

II.

JURISDICTION

1.

The decision and judgment petitioners seek to have this court review, were entered January 18, 1932. (R., 264) Petition for rehearing was filed, and thereafter denied on February 23, 1932. (R., 267) On application of petitioners, an order of Circuit Judge Wilbur was entered staying the issuance of mandate to and including the 1st day of April, 1932, to permit the filing of a petition for writ of certiorari. (R., 268)

2.

The statutory provision believed by petitioners to sustain the jurisdiction of this court is:

Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stats. 938.

3.

The reasons relied upon by petitioners for the allowance of the writ appear upon pages 7 to 10 of the petition herein, and will not be repeated in the brief except as necessary to present the argument.

III.

STATEMENT OF THE CASE

A full statement of the case has been given under the heading SUMMARY STATEMENT OF THE MATTER INVOLVED, appearing on pages 2 to 7 of the petition, and in the interest of brevity will not be repeated in this brief. However, we desire to call attention to the fact that, while the character and amount of the judgment which petitioners seek to collect render the instant case of importance to the litigants, we believe the issues involved to be of public and general importance in at least two particulars.

First, by its decision the United States Circuit Court of Appeals for the Ninth Circuit has announced the rule that a Federal Circuit Court may, in an injunction proceeding, review an issue litigated by the identical parties, involving a state statute and contract executed thereunder, and passed upon by the highest court of the state; and in so doing expressly decline to follow or approve the opinion of the state court, and approve and adopt the opinion of a dissenting justice.*

Second, the record discloses a multiplicity of proceedings *instituted by the American Surety Company* and discloses that at one and the same time the surety company had pending four separate and distinct proceedings in three separate courts, namely:

(a) An appeal to the Supreme Court of Idaho from the judgment of June 23, 1930. (R., 122)

(b) An appeal pending in the Supreme Court of Idaho from an order denying the surety company's motion to amend and vacate the judgment of June 23, 1930. (R., 126)

(c) An appeal to the United States Circuit Court of

*It has never been contended by the surety company that Sec. 7155, Idaho Compiled Statutes, is unconstitutional, or that generally the granting of judgment upon motion without notice is unconstitutional, and no court during any of the proceedings involved herein has ever so held.

Appeals for the Ninth Circuit from a decree of the Federal District Court for Idaho dismissing its bill of complaint and denying its application for temporary injunction to restrain the judgment creditors from collecting the state judgment. (R., 209)

(d) A petition to the Supreme Court of the United States for writ of certiorari to review the decision of the Supreme Court of Idaho of May 2, 1931. (October Term, 1931, No. 494.)

The record further discloses that in each jurisdiction the surety company appeared generally and was seeking in each court to litigate the same issues.*

Wholly aside from the importance of the case to the petitioners, we believe it to be of public and general importance for this Honorable Court to take jurisdiction and review the surety company's procedure, as well as the substantive law, for so far as our search of authorities has availed us, we have been unable to find any case parallel in multiplicity of proceedings.

IV.

SPECIFICATIONS OF ERROR

Petitioners rely upon and adopt as their specifications of error the Reasons Relied on for The Allowance of The Writ appearing at pages 7 to 10 of the petition, which are adopted by reference and which, for convenience and brevity, are generally grouped as follows:

1.

The court erred in declining to give full faith and credit to the state judgment in question.

2.

The court erred in declining to accept the Idaho judgment as *res judicata* upon the issue of jurisdiction.

3.

The court erred in refusing to adopt the construction placed upon the Idaho statutes in question, and particularly

*Although it does not appear in the record, the Supreme Court of Idaho on February 20, 1932, dismissed the surety company's appeal from the judgment.

Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho and in construing Idaho statutes in conflict with the decisions of the Idaho courts.

4.

The court erred in reviewing the decision of the Supreme Court of Idaho for error, and reversing the same.

5.

The court erred in failing to accept the rule of general appearance as announced by the Supreme Court of Idaho.

6.

The court erred in holding that the entry of the Idaho judgment was in "violation of the Federal Constitution."

7.

The court erred in granting a temporary injunction pending appeal, and in directing the lower court to grant a temporary injunction as prayed.

V.

ARGUMENT

The supersedeas bond filed by the American Surety Company was given pursuant to the strictly joint appeal of the Singer Sewing Machine Company and Ed Anderson from a joint judgment, and was an Idaho contract executed and filed in an Idaho court, pursuant to an Idaho statute, Section 7155. (App. A). The effect of the decision of the Supreme Court of Idaho in the primary or original case, (being the appeal in which the undertaking was given) was a matter for judicial determination by the Idaho courts. Petitioners accordingly moved the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, for judgment, that being the court in which the bond was filed and being a court of original jurisdiction under the Constitution of Idaho, Article V, Section 20.*

---

*Idaho Constitution, Article V, Section 20: "Jurisdiction of district court. The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

Under the Constitution of Idaho, the Idaho statute (Section 7155) and the express terms of the bond, the court in which the motion for judgment was actually made *was the only court having jurisdiction to pass upon the surety company's liability under the bond;* and the procedure followed by petitioners was the procedure provided by statute and long established by custom.

These facts, we believe, bring the case within the rule announced by this court in Ramsey-Gatlin Const. Co. v. Vincennes Bridge Co., 283 U. S. 796, where it was said:

> "*Per Curiam*: As it appears from statements at the bar that the contract herein and the bond given pursuant thereto were made and the obligations thereof were to be performed within the State of Kentucky, and as the bond should be construed in accordance with the law of that state, and it appearing that, since the certification herein, the Court of Appeals of Kentucky has construed the bond in question and decided that one in the position of the appellee in the court below, as a subcontractor, was entitled to avail itself of the provision in the bond and maintain its action *(Aetna Casualty & Surety Co. v. Wheeler & Putnam Co.,* decided March 27, 1931, 236 Ky. .....) the Court is of opinion that there is no occasion for an answer by the Court to the question propounded in the certificate."

Following the entry of judgment, the surety company, by general appearance, moved the court to vacate and set aside the judgment upon jurisdictional grounds and upon grounds *which were not jurisdictional;* in the same motion it moved the court to quash the execution proceedings then under way, which could, of course, be done only by a court having jurisdiction. As pointed out in the decision of the Supreme Court of Idaho (R., 51) the surety company did not appeal, although under a statute of Idaho, jurisdictional grounds may be assigned for the first time upon a direct appeal.

Idaho Comp. Stat., Sec. 6693 (App. B);
Hauter v. Coeur d'Alene Min. Co., 39 Idaho 621, 634.

In the proceeding to vacate the judgment and quash the execution proceedings, the surety company litigated not only the issue of jurisdiction, but other issues presented by its

motion as to the construction of the bond. The litigation in that proceeding was based and predicated upon the objections to the judgment assigned and determined upon by the surety company in its said motion to vacate, which it *elected to rely upon* in avoiding payment of the judgment.

Furthermore, the surety company itself presented a true copy of the supersedeas as a part of its motion to vacate, filed in the state trial court (R., 36) and presented to the court the interpretation which it contended should be placed upon the bond. It being an Idaho contract, that question was one to be determined by the state court and when so determined was *res judicata*. In the decision of the Supreme Court of Idaho, as the same appears at page 52 of the Record, after citing authorities, the Court said:

> "It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. *We cannot accept this view.*" (Italics ours.)

Upon this issue, we desire to call attention to a memorandum opinion of the late Judge Dietrich of the United States Circuit Court of Appeals for the Ninth Circuit, who presided as the trial judge in *U. S. F. & G. Co. v. Fort Miscry Highway District*, and whose decision was affirmed by the Circuit Court in 22 Fed. (2d) 369. This opinion is not contained in the Federal Reporter, but appears at pages 147 to 166, inclusive, in the transcript on file in the Circuit Court of Appeals for the Ninth Circuit, being Case No. 5158, and is referred to and cited with approval by Judge Cavanah in his memorandum opinion. (R., 189) The question under consideration, as hereinbefore stated, involved Section 7155, Idaho Compiled Statutes.

The language of that opinion is so apt, and we believe correct when applied to the case at bar, that we adopt it as a statement of the position of petitioners herein.

> "In rendering both the primary judgment and the subsequent judgment upon the bond, it is, therefore, thought

the Court was acting in the exercise of its general jurisdiction. By filing the bond purporting to be given under Sec. 7155, the Fidelity Company submitted itself to that jurisdiction. *And that is true whether the bond does or does not constitute a valid obligation.* Plaintiff thus in effect said to the Court that it entered its appearance for an adjudication of its rights and obligations under the bond. Any other view leads to an absurdity. It would operate to limit a court of general jurisdiction to the performance of a ministerial or a clerical, rather than a judicial function. It is a necessary attribute of such a court that it have the power to decide wrong, as well as right, and to determine questions of its own jurisdiction. If the state court has jurisdiction only in the case of a valid bond, and it is without the power preliminarily to determine this jurisdictional question, manifestly it is incapable of rendering a judgment in any case of a bond, which cannot be assailed for want of jurisdiction. *Its judgment could never be final.* * * * * *And the same result would follow,* * * * * * *in case of a general appearance by the Company* to resist judgment, *for it contends that an invalid bond fails to confer jurisdiction* of the subject matter, as well as of the person. Undoubtedly, it was the duty of the Court not to render judgment upon this bond, if it was without consideration; but some tribunal must have the power to determine whether there was or was not consideration. As is said in Fauntleroy v. Lum, 210 U. S. 230, 235: 'Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed.' See, also, to the same effect Burnet v. Desmornes, 226 U. S. 145. The power conclusively to decide whether such a bond is valid must be lodged in some competent tribunal, and clearly I think that power is possessed by the court in which it is filed. A surety thus enters appearance and submits to its jurisdiction both the person and the subject matter. In any other view the judgment so provided for, whether it be in favor of or against the surety, would be a futile thing, for in any case the defeated party could bring a plenary suit either in the same, or some

other court, and by pleading the invalidity of the bond, compel an adjudication of that question *de novo.*" (Emphasis ours.)

If the reasoning found in this decision of Judge Dietrich is sound, the hypothetical question to which he referred is actually realized in the case at bar.

BALDWIN v. IOWA TRAVELING MEN'S ASS'N, 283 U. S. 522, IS BELIEVED TO BE CONTROLLING

In the case above cited, Mr. Justice Roberts, in discussing the question of jurisdiction, said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

This opinion, so far as we have been able to ascertain, is the latest expression of this Honorable Court upon the question and is, we believe, controlling in the case at bar.

For, in addition to the reasons stated by Mr. Justice Roberts in the Iowa case, the case at bar involves a state judgment which, under Sec. 1, Art. IV of the Constitution of the United States and the decisions of this court, is entitled to full faith and credit in the courts of the United States. Further, the Iowa case decides that due process of law does not involve the right to litigate the same question twice. In the case at bar, the American Surety Company does not ask that it merely be allowed to litigate the question of jurisdiction *twice,* but insists that it shall have *three* separate and distinct hearings, for the record discloses a motion to amend and correct the judgment filed only a few days before the injunction proceeding was filed in the Federal court, which had not been passed upon by the State trial court when the bill of complaint was filed with the Federal court. And the surety's appeal therein was not only pending on the day the opinion

of the Circuit Court of Appeals was filed but the same is actually, at the date of the writing of this brief, pending and undisposed of in the Supreme Court of Idaho. The correctness of our position was apparently recognized by the surety company, for in its bill it endeavored to plead fraud, although such allegations were so totally insufficient as to be stricken, (R., 192) and the order granting the motion to strike was not disturbed by the Circuit Court of Appeals. The bill, therefore, stripped of the conclusions of fraud, disclosed upon its face first, that the question of jurisdiction was *res judicata,* and, second, that a final judgment on the question of jurisdiction had been entered by the Supreme Court of Idaho, which judgment is entitled to full faith and credit under Sec. 1, Art. IV of the Constitution of the United States.

The opinion of Mr. Justice Roberts is also important, we believe, in distinguishing *National Exchange Bank v. Wiley,* 195 *U. S.* 257, which is cited and relied upon in the decision of the Circuit Court of Appeals. (R., 258)

Also see:

Forsyth v. Hammond, 166 U. S. 506.

SPECIFICATIONS OF ERROR NOS. 3 AND 4

As to specifications of error 3 and 4, the opinion of the Idaho Supreme Court (R., 47-56) plainly discloses that the Court held in view the joint nature of the judgment and the joint appeal therefrom, in connection with which the surety company's undertaking was filed in the State court. The opinion states that the litigants discussed

> "the legal effect of the different provisions of the bond *in the light of the nature of the appeal.*" (R., 50)

The Idaho court held (1) that the Singer Company was not the surety company's principal in the contract in question, and (2) that the Supreme Court's reversal of the original judgment as against the Singer Company did not dismiss the surety company from the action. It so held after construing the undertaking to the point of determining that it presented "a legitimate question" for judicial determination. (R., 55) From these propositions the court concluded that the surety company was still in court, that therefore notice of petitioners' proceeding, by motion, for judgment against it was not required, and that the meaning and effect of its

contract was a matter to be determined by the trial court in the exercise of its jurisdiction theretofore obtained. (R., 52-55)

It follows that the Circuit Court of Appeals was mistaken in stating in its opinion (R., 260) that the Idaho Supreme Court merely *assumed* that the surety was in court at the time of the motion for judgment.

On the other hand, the Circuit Court of Appeals refused to accept the Idaho court's decision, and held that the Singer Company was the principal in the surety company's contract and that the reversal of the original judgment as against the Singer Company dismissed the surety company from the action. The opinion discloses that it was on these two propositions and these alone, that the Circuit Court arrived at the conclusion that due process of law had been denied the surety company.

In short, both the Federal and State courts are agreed that the surety company and its contract were in court originally; but the Federal Appellate Court has reviewed and reversed the decision of the State Supreme Court as to what, under the laws of the state, would operate to dismiss the surety company. It has placed its own construction upon the State statutes and the contract. That construction is the sole basis for the judgment which the Circuit Court of Appeals entered. In substance, the Circuit Court holds that the State trial court, in deciding the issue presented by petitioners' motion, should have consulted the undertaking and construed it; but that it was not empowered to place thereon its own construction; that the court should have taken the incorrect and misleading recitals of purported fact therein as controlling, instead of considering, as did both the trial and Supreme courts, the *conditions* therein stated upon which the surety company agreed to become liable, and the nature of the judgment and the appeal in the light of the pertinent state statutes.

SPECIFICATIONS OF ERROR NOS. 5 AND 6

As to specifications of error Nos. 5 and 6, this court heretofore announced the following rule, in *Western L. Indemn. Co. v. Rupp*, 235 *U. S.* 261:

> "That a state, without violence to the 'due process' clause of the 14th amendment, may declare that one who voluntarily enters one of its courts *to contest any ques-*

tion there pending shall be deemed to have submitted himself to the jurisdiction of the court *for all purposes of the action* * * * is settled by the decision of this court in York vs. Texas, 137 U. S. 15; 34 L. Ed. 604; 11 Sup. Ct. Rep. 9; followed in Kauffman vs. Wooters, 138 U. S. 285; 34 L. Ed. 962; Sup. Ct. Rep. 298." (Italics ours.)

We submit that under this rule the Idaho Supreme Court did no violence to the 14th amendment in holding herein that pursuant to its appearance and the filing of its undertaking in the original action, the surety company and its contract remained within the jurisdiction of the court for all purposes relating to a determination of the meaning of that contract and the obligation of the surety company thereunder.

If we are correct thus far, it follows that the Circuit Court was fundamentally in error in holding that due process had been denied the surety company.

Speaking with particular reference to the assignment of error 6, the decision of this court last above quoted from is authority for the further proposition, that even though a proceeding may have been had in State court against a party, without due process of law, yet if such party thereafter comes into the State court in that proceeding, the State court has the exclusive power to determine whether or not such appearance brings the party within the jurisdiction for all purposes.

The Idaho Supreme Court, long prior to the matter here in question, announced the rule that where a party comes into a State court after judgment has been rendered against him, and seeks to vacate the judgment, he must restrict himself to the question of jurisdiction only. If he claims a lack of notice as voiding the judgment, but also seeks to have execution proceedings on the judgment quashed, he thereby submits himself to the jurisdiction of the court as to all things at issue in the action.

Elliott & Healy v. Wirth, 34 Idaho 805, 806.

This respondent did precisely the same thing that was done in the Wirth case, *supra*. It came into court after judgment, contending that the judgment was void for want of notice, and also sought and obtained an order quashing the execution proceedings then under way; and further sought equitable relief, as well as a construction of its contract which

necessarily went into the substantive merits of the matter. (R., 36-39)

After litigating that matter to the court of last resort, the surety company again appeared generally and presented its motion to *amend* the judgment, which it here contends was *void*. (R., 69-72) After a full hearing and lengthy showing of fact and a denial of that motion, it appealed to the Idaho Supreme Court, where that appeal is still pending.

Also, it took a general appeal from the judgment itself, in which, obviously, it sought a review of the judgment for error in substantive matters, since the question of jurisdiction had been litigated and determined by the State Supreme Court before this last mentioned appeal was taken.

We submit that the several general appearances of this respondent in State court and the numerous non-jurisdictional matters presented by it to the State courts, effectually bring it within the rule, that if there were originally any lack of due process, it has been waived. If so, the Federal Appellate Court erred in not so holding.

In concluding we respectfully submit that this case presents a conflict between State and Federal courts which can only be finally determined by the decision of this Honorable Court.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit, and finally reverse it.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX A

Idaho Compiled Statutes, Sec. 7155.

"**Section 7155 (4810). Same: Supersedeas: Money judgment.** If the appeal be made from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency."

APPENDIX B

"Section 6693. When objections deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."